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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. MELVIN ALFARO-ZUNIGA, Defendant.	Criminal Case No. 08CR1276-H **UNITED STATES' RESPONSE AND OPPOSITION TO DEFENDANT'S MOTIONS TO:** **(1) COMPEL DISCOVERY AND PRESERVE EVIDENCE;** **(2) DISMISS INDICTMENT;** **(3) SUPPRESS EVIDENCE** **(4) SUPPRESS STATEMENTS; AND** **(4) FILE FURTHER MOTIONS** **ALONG WITH UNITED STATES' MOTION FOR RECIPROCAL DISCOVERY** Date: May 27, 2008 Time: 2:00 p.m. Honorable: Marilyn Huff

Plaintiff, United States of America, by and through its counsel, Karen P. Hewitt, United States Attorney, and Christina M. McCall, Assistant United States Attorney and hereby files its Response and Opposition to Defendant's Motions and its Motion for Reciprocal Discovery. This Response and Opposition is based upon the files and records of the case together with the attached statement of facts and memorandum of points and authorities.

I

STATEMENT OF FACTS

A. Defendant's Apprehension

On April 1, 2008, Drug Enforcement Administration Special Agent Michael Dockery encountered a suspicious big-rig truck during his surveillance of a Shell gas station in El Centro. Agent Dockery was using binoculars and his sport utility vehicle. Agent Dockery observed two sedans arrive at the rear of a while semi truck and trailer around 8:20 p.m. The two sedans turned off their lights once they pulled into the station and toward the semi truck. The truck and trailer were parked in the rear of the gas station, whose overhead lights were turned off. Agent Dockery saw the rear doors of the trailer open, then close. At around 8:27 p.m., the two sedans left the area and drove south on Old Highway 111.

At 8:45 p.m., the truck lights came on, and the truck drove through the gas station's parking lot. The truck then pulled into the shoulder of the road and parked near the intersection of Old Highway 111 and Ross Road. When the truck pulled over, facing the road, Agent Dockery was able to see that the driver was wearing a white T-shirt, because the truck cab's light was turned on. Then, the truck quickly returned to the same Shell gas station in El Centro. At 8:55 p.m., a large yellow van pulled next to the rear of the trailer. This yellow van also blacked out its lights once it approached the semi-truck. Agent Dockery then saw the yellow van leave the gas station, heading south on Old Highway 111. At 9:10 p.m., a sedan with blacked-out lights approached the semi-truck. A passenger from the sedan climbed into the truck's trailer, and the trailer doors closed.

Then, at 9:15 p.m., the semi-truck left the gas station parking lot in El Centro and traveled toward Westmorland. Agent Dockery followed the truck. At 9:50 p.m., the semi-truck pulled into a Shell gas station in Westmorland. The truck parked in the rear of the gas station and backed up to the fence. Ten minutes later, the semi-truck left the gas station lot and drove north on Highway 86 toward the Border Patrol checkpoint. Agent Dockery continued his surveillance of the truck by driving along the same road. Believing that the semi-truck was being used to transport illegal aliens, Agent Dockery used his cellular phone to call Border Patrol Agent Delgado at the Highway 86 checkpoint.

When Agent Dockery approached the checkpoint, a few vehicles ahead of the semi-truck, he identified the truck for the inspecting agent. Agent Martinez made the initial contact with the semi-truck and its driver, asking in English and in Spanish for the driver, Defendant Melvin Alfaro-Zuniga, to state his citizenship. Defendant hesitated when asked this question. Agent Martinez then asked Defendant a second time to state his citizenship. Defendant said nothing and handed Agent Martinez his employment authorization document. Defendant then stated that he was a citizen of El Salvador. During this brief questioning, Agent Martinez noticed that Defendant was trembling. Agent Martinez then handed the documents back to Defendant and watched Defendant nervously fumble the documents. Agent Martinez then questioned Defendant about the contents of the trailer. Defendant said that he was hauling celery from Yuma, Arizona and handed the agent a cargo manifest. While Defendant handed the cargo manifest, Agent Martinez again noticed that Defendant's hand was shaking nervously. During questioning, Agent Martinez noticed that Defendant's voice was cracking and giving out.

Agent Delgado then told Agent Martinez to send the truck to the secondary inspection area. Agent Martinez then asked Defendant for permission to search the entire truck and trailer. Defendant agreed, and Agent Martinez instructed Defendant to pull into the secondary inspection area. After Defendant gave consent to search a second time, Agent Delgado and his detector dog inspected the exterior of the truck and trailer. After the dog alerted to the trailer, Agent Delgado asked Defendant for permission to break the seal and search the trailer. Alfaro again granted consent.

Agent Delgado removed the seal, opened the rear door, and peered inside the trailer. Agent Delgado used his flashlight to look under the pallets, immediately noticing a pair of shoes. Three Border Patrol agents entered the trailer and found a total of twenty people hiding inside. The temperature inside the trailer was 43 degrees Fahrenheit. The agents identified themselves and questioned the twenty people about their citizenship and immigration status. All twenty people admitted to being citizens and nationals of Mexico without any permission to legally enter the United States. Agents took the driver and the twenty illegal aliens into custody.

At 1:27 a.m., agents advised Defendant of his Miranda rights, which he acknowledged. Defendant invoked his right to remain silent and questioning ceased. The material witnesses-- Sergio De la Cruz-Cervantes, Diego Mora-Rincon and Andres Vizcaino-Galarza--were also interviewed. The material witnesses were unable to identify the driver of the semi-truck, but all stated they were to pay a $2500 fee to be illegally smuggled to Los Angeles. The material witnesses described illegally crossing the border near Calexico on foot. Then, the material witnesses were picked up by a car and were taken to a small house. After spending two or three days in the crowded house, the material witnesses were placed into different vehicles and told to hide. Then, the material witnesses arrived at a gas station, where they were told to enter the semi-truck's trailer and keep quiet.

On April 23, 2008, a federal grand jury for the Southern District of California returned a three-count Indictment against Defendant, charging him with: transporting an alien-- (1) Sergio De la Cruz-Cervantes, (2) Andres Vizcaino-Galarza, and (3) Diego Mora-Rincon -- within the United States, in violation of Title 8 U.S.C. § 1324(a)(1)(A)(ii) and (v)(II). At the arraignment on the Indictment on April 24, 2008, Defendant entered a not-guilty plea.

II

UNITED STATES' RESPONSE AND OPPOSITION TO DEFENDANT'S MOTIONS

A. ORDER COMPELLING DISCOVERY IS UNNECESSARY

No Order is Required; The United States is Complying With Discovery Obligations

The United States has produced 153 pages of discovery as of the filing of this response, as well as a digital video recording of the defendants' post-arrest Miranda warnings and the interview with the material witnesses. The United States has complied and will continue to comply with its discovery obligations under Brady v. Maryland, 373 U.S. 83 (1963), the Jenks Act (18 U.S.C. §3500), and Federal Rule of Criminal Procedure 16. Because the United States has complied and will comply with its discovery obligations, an order to compel discovery is unwarranted and the request for such an order should be denied. The assigned prosecutor is attempting to locate the specific items the defense attorney requested on page 2-3 of his motion. Consistent with these efforts, the color photographs of the vehicle have just been provided as discovery, as well as the videotape of the post-apprehension interview. However, there was no recording of the telephone conversation between Agent Dockery and Agent Delgado.

B. THE GRAND JURY WAS NOT MIS-INSTRUCTED

Defendant moves to dismiss the indictment against him for alleged errors in this Court's instruction of the grand jury panel. The United States explicitly incorporates by reference the briefing on this issue submitted in United States v. Bermudez-Jimenez, 07CR1372-JAH, and United States v. Martinez-Covarrubias, 07CR0491-BTM. This motion has been denied by each court that has considered it, and should also be denied in this case.

B. EVIDENCE SEIZED DURING THE CONSENSUAL SEARCH AT THE CHECKPOINT IS ADMISSIBLE

Defendant argues that the warrantless search of the trailer he was hauling was unreasonable, and that this Court should suppress all evidence following the search. This motion should be denied. Defendant fails to acknowledge in his suppression motion that he consented **three times** to a search of his truck and trailer.

The law governing vehicle stops at permanent Border Patrol immigration checkpoints like the one at issue here is well-settled. In United States v. Martinez-Fuerte, 428 U.S. 543 (1976), the Supreme Court specifically upheld the constitutionality of such checkpoints. The Court recognized that vehicle stops at such checkpoints are seizures within the meaning of the Fourth Amendment. Id. at 556. However, given the Government's "special need" to stem illegal immigration, lesser protections attach to these stops. A vehicle may be stopped at an immigration checkpoint for brief initial questioning and referred to a secondary inspection area for further immigration questioning "in the absence of any individualized suspicion." Id. at 543.

During primary or secondary inspection of a vehicle at an immigration checkpoint, Border Patrol agents may request consent to search. United States v. Martinez-Fuerte, 428 U.S. 543, 567 (1976); United States v. Ortiz, 422 U.S. 891, 898 (1975). Where agents obtain voluntary consent, they may search without a warrant and even without probable cause. Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

The search of the tractor and trailer that Defendant was driving was lawful, since it was justified by consent. There is no indication that Defendant's consent to search was forced. Defendant consented to a search three times, with two different agents. The evidence obtained as a result of the consensual search should not be suppressed.

Beyond Defendant's consent to search, there was ample probable cause to search the truck. Highway 86 checkpoint is deliberately located in a corridor frequently used by alien and drug smugglers. At primary inspection, Defendant, an alien, failed to answer routine questions about his citizenship and he acted in an unusual manner, with shaking hands and a cracking voice. Here, based on Defendant's unusual behavior at primary inspection, the Border Patrol agents were suspicious that he was smuggling contraband.

Probable cause to search a vehicle generally means that officers have a reasonable belief that seizable items are located within a lawfully stopped vehicle. Carroll v. United States, 267 U.S. 132, 158-62 (1925). Probable cause can be based on the collective knowledge of police officers involved in an investigation, "even if some of the information known to other officers is not communicated to the arresting officer." United States v. Butler, 74 F.3d 916, 920-21 (9th Cir. 1996).

In this case, Agent Dockery essentially witnessed the loading of illegal aliens into the cargo area of a big-rig truck, under very suspicious circumstances. First, all of the lights in the back parking lot of the Shell station had been turned off. Second, the big-rig truck's lights were completely turned off. No fewer than four different cars deliberately drove through the gas station and right up to the lone truck in the parking lot, also blacking out their lights. Agent Dockery witnessed the trailer doors open and close, in connection with the arrival of the blacked-out vehicles. There was ample probable cause, based upon Agent Dockery's surveillance observations, to believe that illegal immigrants were located within the vehicle that pulled up to the checkpoint inspection area. Agent Dockery telephoned ahead to an agent at the checkpoint to alert the agent about the presence of illegal aliens inside this particular truck. Defendant's nervous demeanor at the inspection booth further led agents to conclude that he had contraband hidden inside the vehicle. Although this search is completely justified by Defendant's consent to search, it is also supported by probable cause. The motion to suppress evidence of the search should be denied.

B. WITNESS STATEMENTS SHOULD NOT BE SUPPRESSED

The motion to suppress statements of any witness who is unavailable at trial is premature. This motion should be decided at the motions in limine stage of the trial, if not during the trial itself.

C. LEAVE TO FILE FURTHER MOTIONS

The United States does not oppose Defendant's request for leave to file further motions, so long as such motions are based on discovery not yet received by Defendant.

III

UNITED STATES' MOTION FOR RECIPROCAL DISCOVERY

Defendant has invoked Fed. R. Crim. P. 16(a) and the United States has voluntarily complied with the requirements of Rule 16(a). Therefore, provision 16(b) of that rule, requiring reciprocal discovery, is applicable. The United States hereby requests Defendant to permit the United States to inspect, copy, and photograph any and all books, papers, documents, photographs, tangible objects, or make copies of portions thereof, which are within the possession, custody or control of Defendant and which he intends to introduce as evidence in her case-in-chief at trial.

The United States further requests that it be permitted to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with this case, which are in the possession or control of Defendant, which he intends to introduce as evidence-in-chief at the trial or which were prepared by a witness whom Defendant intends to call as a witness. The United States also requests that the court make such orders as it deems necessary under Rule 16(d)(1) and (2) to insure that the United States receives the discovery to which it is entitled.

Federal Rule of Criminal Procedure 26.2 requires the production of prior statements of all witnesses, except Defendant. The time frame established by the rule requires the statement to be provided after the witness has testified, as in the Jencks Act. The United States hereby requests that Defendant be ordered to supply all prior statements of defense witnesses by a reasonable date before trial to be set by the court. This order should include any form these statements are memorialized in, including but not limited to, tape recordings, handwritten or typed notes and/or reports.

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V

CONCLUSION

For the foregoing reasons, the United States respectfully requests that Defendant's motions, except where not opposed, be denied and the United States' motion for reciprocal discovery be granted.

DATED: May 22, 2008

Respectfully Submitted,

KAREN P. HEWITT
United States Attorney

/s/ Christina M. McCall

CHRISTINA M. McCALL
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. MELVIN ALFARO-ZUNIGA, Defendant.	Case No. 08CR1276-H **CERTIFICATE OF SERVICE**

IT IS HEREBY CERTIFIED that:

I, CHRISTINA M. McCALL, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101.

I am not a party to the above-entitled action. I have caused service of RESPONSE AND OPPOSITION TO DEFENDANT'S MOTION TO COMPEL DISCOVERY, DISMISS INDICTMENT, AND SUPPRESS STATEMENTS on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

Joseph McMullen

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 22, 2008.

/s/ Christina M. McCall
CHRISTINA M. McCALL